(7)

Supreme Court, U.S.
FILED
OCT 6 2003
OFFICE OF THE CLERK

No. 03-339

IN THE

Supreme Court of the United States

FRANCISCO SOSA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK D. ROSENBAUM
ACLU Foundation of
Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 997-9500

ALAN RUBIN
EPSTEIN, ADELSON & RUBIN
11755 Wilshire Boulevard
Fifteenth Floor
Los Angeles, California 90025
(213) 473-6447

PAUL L. HOFFMAN
Counsel of Record
ERWIN CHEMERINSKY
SCHONBRUN, DESIMONE,
SEPLOW, HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

RALPH G. STEINHARDT
George Washington
University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-5739

Attorneys for Respondent
HUMBERTO ALVAREZ-MACHAIN

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

40 pp

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Venice, California 90291
(310) 396-0731

RALPH G. STEINHARDT
George Washington
University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-5739

Attorneys for Respondent
HUMBERTO ALVAREZ-MACHAIN

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October Term, 2003
No. 03-339

Supreme Court of the United States

Francisco Sosa.,

Petitioner,

vs.

Humberto Alvarez-Machain,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Francisco Sosa. Petitioner, with the support of the United States, seeks review of a well-reasoned, factually unique ruling by the Ninth Circuit Court of Appeals sitting *en banc*, which correctly applied the applicable law upon which the circuit courts of appeal are not divided. Significantly, the Court has repeatedly denied *certiorari* in cases raising the very issues identified by Petitioner and the Government. The case presents no "compelling reason" for review under SUP. CT. R. 10. and is not a suitable vehicle for addressing the Respondent's or the Government's broad concerns.

STATEMENT OF THE CASE

A. Introduction

Respondent Humberto Alvarez-Machain opposes the petition for a writ of certiorari because the decision below is correct as a matter of law and warrants no further review. Contrary to Petitioner's and the Government's assertions, there is no split among the circuit courts on any of the issues presented in the petition.

Enacted in 1789 as part of the First Judiciary Act, the Alien Tort Claims Act ("ATCA") provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] As shown below, since *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the ATCA has been interpreted to establish subject matter jurisdiction and a cause of action for serious violations of international law, including violations of human rights norms. Congress squarely endorsed *Filartiga* and extended its reach from aliens to U.S. citizens in the Torture Victim Protection Act of 1992 ("TVPA"), 28 U.S.C. § 1350 note, denying in the

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[1] 28 U.S.C. § 1350. The term "law of nations" was used until the early 20th century in reference to the customary rules and obligations that regulated interaction between states and certain aspects of state interaction with individuals. It has now been supplanted by the term "customary international law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 Introductory Note (1987) ("RESTATEMENT (THIRD)").

process that a legislative cause of action was required before ATCA proceedings were appropriate.

Petitioner and the Government stress their concerns about the use of the ATCA in other contexts, such as corporate complicity in human rights violations and the war on terrorism, but these concerns are pretextual. The case involves no corporate defendant and no issue involving corporate responsibility. Nor does the case concern the war on terrorism or any other war. It arises out of the transborder abduction of a criminal suspect from Mexico to the United States, authorized and orchestrated by low-level government officials and carried out by private Mexican citizens who acted without legal authority. This case does not involve the authority of the President or cabinet officials to override international law to protect the national security of the United States. Nor does it address the authority of any U.S. agency other than the Drug Enforcement Agency ("DEA") to engage in extraterritorial arrests and other law enforcement activities or anti-terrorist activities. Certainly, if Congress wished to provide DEA agents with extraterritorial arrest authority, it could do so. But in the absence of that legislative directive, this Court can allow the *en banc* decision of the Ninth Circuit to stand without compromising the ability of the United States government to defend itself. The courts have well-developed doctrines and techniques for screening out frivolous, vexatious, or politically-charged cases when appropriate.

What is at stake in this case is the rule of law. Basic principles dating back to the Magna Carta, enshrined in our Constitution and recognized in international human rights law, prohibit this kind of abuse of official authority, and there can be little doubt that the decision below was right in finding

abuse on these facts: hiring former police officials in a foreign country to seize a criminal suspect in the middle of the night and secretly transporting him hundreds of miles to a foreign country without any legal authority or authorization constitutes arbitrary arrest and detention under international and domestic law. Though the factual setting is unique, it is unexceptional that the ATCA would be available to enforce human rights standards with such a distinguished pedigree.

Petitioners' first question – whether the ATCA provides a cause of action or is jurisdictional only – raises an issue which has been raised repeatedly by defendants in ATCA cases for two decades and which has been rejected by every court to rule upon the issue. This Court has repeatedly denied *certiorari* petitions raising this issue.

Similarly, there is no conflict in the circuits regarding petitioner's second question – whether ATCA lawsuits are limited to violations of *jus cogens* norms. No court has required a *jus cogens* norm for ATCA purposes, and every court to consider Petitioner's argument has rejected it. It is unnecessary for this Court to take on a complex and somewhat esoteric issue in the absence of some clarifying analysis and disagreement among the lower courts.

Petitioner's third question – whether respondent's arbitrary arrest and detention constitutes a tort in violation of international law – is similarly without controversy. There can be no dispute that international law prohibits arbitrary arrest and detention, and that the U.S. fully supports this norm. This case appears to be the first reported U.S. decision applying this norm in this specific context, but the application of the international prohibition on arbitrary arrest and

detention is clear in these circumstances, as determined by the courts at both the trial and the appellate levels. This issue standing alone certainly does not warrant review in this Court.

B. Proceedings Below

Respondent was abducted at gunpoint by petitioner and his co-conspirators from his medical office in Guadalajara, Mexico, in April 1990. His kidnappers were private Mexican citizens acting without legal authority. He was transported to a nearby city, held overnight, and flown to El Paso, Texas, the next day where he was handed over to waiting DEA agents. Respondent challenged the district court's jurisdiction and moved to dismiss his indictment, arguing *inter alia*, that his abduction was a violation of the U.S.-Mexican extradition treaty. Ultimately, this Court rejected Respondent's treaty argument. *United States v. Alvarez-Machain* , 504 U.S. 655 (1992). Respondent went to trial in November 1992, and on December 14, 1992, the district judge granted a motion of acquittal under FED. R. CRIM. P. 29.

Respondent filed this action on July 9, 1993, seeking damages for his April 1990 abduction, *inter alia*, under the ATCA. Petitioner moved to dismiss the case and also to substitute the United States as a defendant under the Westfall Act for any claims Respondent made against him, including the ATCA claims at issue in this petition. Petitioner's motion for substitution was denied, and Petitioner did not appeal from that ruling. The ATCA claims against all the other individual defendants were substituted under the Westfall Act and became claims against the United States under the

Federal Tort Claims Act ("FTCA"). The district court and the court of appeals decided that Respondent could not maintain ATCA claims against federal officials, and that disposition is not before this Court.

The district court granted Respondent's summary judgment motion with respect to his ATCA claims against Petitioner. In the same ruling, the district court granted the summary judgment motion filed by the United States dismissing Respondent's FTCA claims. Subsequently, the trial court held a bench trial on damages and entered a judgment of $25,000 in compensatory damages against Petitioner based on his violation of Respondent's right not to be subjected to arbitrary arrest and detention and his right not to be subjected to transborder abduction.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit. A panel of the Ninth Circuit affirmed the district court's judgment against Petitioner under the ATCA and reversed the district court's FTCA ruling and remanded to the district court for further proceedings on those claims. The panel affirmed the judgment against Petitioner on the grounds that transborder abduction and arbitrary arrest and detention violated the law of nations. The Ninth Circuit agreed to rehear the appeal *en banc* and, on June 3, 2003, affirmed the judgment against Petitioner.

The *en banc* majority found that Respondent's abduction constituted arbitrary arrest and detention. Simultaneously, the *en banc* court also rejected Respondent's argument that transboundary abduction violates the "law of nations" and is actionable under the ATCA. The *en banc* court did so even though the international authorities contrary

to its decision are uniform and powerful, and the authoritative RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, rightly provides that "a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." *Id.*, at § 432(2). Respondent maintains his contention, as found by the district court and by the Ninth Circuit panel, that state-sponsored transborder abduction of this kind violates the law of nations and comes within the ATCA.

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Have Uniformly Held that the Alien Tort Claims Act Provides a Basis for Relief for Torts Committed In Violation of the Law of Nations.

A. The Courts Are Not Divided on the Circumstances Under Which Liability Under the ATCA Is Appropriate.

Petitioner urges this Court to grant *certiorari* because the Second, Ninth and Eleventh Circuits have allegedly implied a cause of action under the ATCA erroneously. Pet. Br., at 8-11. But the courts' analysis in the relevant cases is consistent with this Court's jurisprudence and the intent of Congress. There is no conflict among the circuit courts.

We start, as Petitioner does, with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), in which the Second Circuit ruled that the ATCA establishes subject matter jurisdiction and a cause of action for serious violations of

international law, including violations of human rights norms. The Second Circuit found explicitly that ATCA was available only when an alien alleged violations of "well-established, universally recognized norms of international law." *Id.*, at 888. The rationale for so high a standard was perfectly clear: "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding on them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." *Id.*, at 881. As noted subsequently by the Second Circuit, "*Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for non-judicial discretion." *Kadic v. Karadzic*, 70 F.3rd 232, 244 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). The Second Circuit has adhered unwaveringly to this standard for over twenty years,[2] allowing

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[2] *See, e.g., Flores v. Southern Peru Copper Corp.*, 2003 WL 22038598, at *10 (2d Cir. Aug. 29, 2003); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983 (*per curiam*). As the government points out, Gov. Br., at 18, the *Flores* court noted that "the law of the District of Columbia Circuit stands in contrast to that of our Circuit and of the other circuits that have followed our holding in *Filartiga*", 2003 WL 22038598, at *8. The government also concedes as it must that the D.C. Circuit has never issued a majority opinion in conflict with *Filartiga*, and that a "contrast" between the law of numerous circuits on the one hand and concurrences in a single circuit on the other

cases that clear the high threshold of "well-established, universally recognized norms of international law"and dismissing cases that do not.

Since *Filártiga, every* circuit court of appeals and *every* federal district court to address and resolve the issue has applied a substantially identical standard, never expressing disagreement with *Filártiga*'s underlying principles. To the contrary, when norms of this sort are found to have been violated, the ATCA provides both subject matter jurisdiction and a cause of action.

The Ninth Circuit Court of Appeals, for example, has consistently agreed with *Filartiga* and held that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).[3] The Eleventh and Fifth Circuit Courts of Appeals have adopted the same standard. *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999). Because these courts have never expressed any disagreement with the Second Circuit, even citing the Second Circuit's precedents with approval, it is frivolous to argue that there is difference between the Second Circuit's phrasing ("well-established, universally recognized

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does not a circuit split make.

[3] *Accord, Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Trajano v. Marcos*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

norms of international law") and the Ninth Circuit's phrasing (the norm must be "specific, universal, and obligatory") requiring intervention by this Court. The inquiry in all of the ATCA cases has been whether the plaintiff is relying on a norm which satisfies the accepted and rigorous tests for determining a customary norm.[4]

The fact is that, since 1980, federal courts in seven circuits have reaffirmed *Filártiga* and its underlying principles,[5] and none has disagreed with its standards (though

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[4] The Supreme Court has repeatedly established the criteria for determining the content and applicability of the law of nations in domestic litigation when Congress has not addressed the international standard. The touchstone is *The Paquete Habana*, 175 U.S. 677 (1900), where the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . .

Id., at 700.

[5] *Filártiga* has been followed, *inter alia*, by circuit and/or district courts in: (i) *First Circuit*: *see, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 178-83 (D. Mass. 1995); (ii) *Second Circuit*: *see, e.g., Kadic v. Karadzic, supra*; (iii) *Third Circuit*: *see, e.g., Iwanowa v. Ford Motor Company*, 67 F.

several have dismissed cases that did not establish a violation of international law). Not even the D.C. Circuit's fractured decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, 470 U.S. 1003 (1985), cited prominently by Petitioner and by the Government, created a conflict with *Filartiga*. In *Tel-Oren*, the panel (Edwards, Bork and Robb, JJ.) divided three ways in refusing to *extend* the *Filártiga* holding to a claim of terrorism against the Palestine Liberation Organization, but nowhere did it state a holding conflicting with *Filártiga*. In fact, Judges Edwards and Bork were careful to point out that their reading of the ATCA did not conflict with the decision of any other circuit, including *Filártiga*. *See Tel-Oren*, 726 F.2d at 790-91 (Edwards, J); *id.* at 819-20 (Bork, J.). In the nearly twenty years since *Tel-Oren*, not a single court has found its contradictory opinions to be persuasive authority, much less that it created a conflict demanding *certiorari* review. Nothing in the recent lone opinion of Judge Randolph in *Al Odah v. United States*, 321 F.3rd 1134, 1148

Supp.2d 424, 438-41 (D.N.J. 1999); (iv) *Fifth Circuit*: *see, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999); (v) *Ninth Circuit*: *see, e.g., Alvarez-Machain v. United States*, 96 F.3d 1246 (9th Cir. 1996), *amended by* 107 F.3d 696, 702-703 (1997), *cert. denied*, 522 U.S. 814 (1997); *In re Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano v. Marcos*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993)); (vi) *Eleventh Circuit*: *see, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996); (vii) *D.C. Circuit*: *see, e.g., Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 7-8 (D.D.C. 1998).

(D.C. Cir. 2003). (Randolph J., concurring), alters the reality that there is no conflict among the circuits on this interpretation of ATCA.

B. The Coherent Jurisprudence of the Courts Under the ATCA Is Correct as a Matter of Law.

There is good reason that no circuit split exists on the issue of whether the ATCA both establishes subject matter jurisdiction and in narrow circumstances recognizes a cause of action: the argument to the contrary is inconsistent with the plain language of the statute and the decisions of this Court. By its terms, the statute covers (i) "*any* civil action," (ii) by an "alien" plaintiff, (iii) suing for a "tort," (iv) "in violation of" international law in either customary or treaty form. Assuming that the plaintiff is an alien, the statute is satisfied so long as the underlying wrong takes tortious form and is in violation of international law. There is no additional requirement that Congress "implement" customary international law or that the case "arises under" federal law. *Cf.* 28 U.S.C. § 1331.

In *Hilao, supra*, the Ninth Circuit carefully examined the ATCA and distinguished it from other jurisdictional statutes:

> [I]n contrast to section 1331, "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic*, [726 F.2d 774, 779] (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). It is unnecessary that international law provide a specific right to sue. International law "does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions." *Id.*, at 777-78 (quoting L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972)). "Nothing more than a violation of the law of nations is required to invoke section 1350." *Id.* at 779.

On the basis of its careful examination of the ATCA's text, relevant case law, and other statutory provisions, the Ninth Circuit concluded that the ATCA "creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . ." *Hilao*, 25 F.3d at 1475. In this case, the *en banc* decision adopts the same approach.

This analysis is consistent with the understanding of eighteenth-century courts, as suggested by the first reported case involving the ATCA, *Bolchos v. Darrel*, 3 Fed. Cas. 1810 (D.S. Car. 1795), in which the plaintiff sought restitution for the value of slaves on a captured Spanish ship. The court made no mention of any additional Congressional action needed to allow the plaintiff to invoke substantive rights under the law of nations. Those rights already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States.[6] "[T]he First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other

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[6] 1 James Kent, COMMENTARIES ON AMERICAN LAW 195 (13th ed. 2001).

tort would be"[7] and that the courts of the fledgling nation should be open to aliens seeking a remedy for violations of international law. Contemporaneous statements by the Attorney General reaffirmed the status of the ATCA as the basis for an alien's suit to enforce international norms.[8]

In addition, the Petitioner's and the Government's position rests on a bizarre anachronism. The very notion of a "cause of action" entered the legal lexicon of this country almost 60 years after the adoption of the ATCA. It only

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[7] William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," 19 HASTINGS INT'L & COMP. L. REV. 221, 239 (1996).

[8] In 1795, for example, the U.S. Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone. The opinion, only six years removed from the adoption of the First Judiciary Act, reveals that the First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be:

> ... there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.

1 *Op. Att'y Gen.* 57, 59 (1795) (emphasis in original). *See also* 26 *Op. Att'y Gen.* 250, 253 (1907) ("I repeat that the statutes thus provide a forum and a right of action.").

"became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" *Davis v. Passman*, 424 U.S. 228, 237 (1979). Petitioner and the Government apparently believe that the ATCA lay dormant from the day of its passage in 1789 until sometime in the nineteenth century when it suddenly sprang into meaning with the arrival of the cause-of-action concept. But that position renders incomprehensible such Supreme Court decisions as *The Paquete Habana*, 175 U.S. 677 (1900), and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), in which this Court approved the application of customary international law in U.S. courts even in the absence of positive Congressional enactment.

In summary, the *en banc* decision below rests on an interpretation of the ATCA traceable to the Second Circuit's decision in *Filartiga*, adopted by every circuit to address and resolve the question, in a sequence of cases denied additional review by this Court. *Certiorari* should not be used to resolve largely academic questions in a case that fails the standards set forth in SUP. CT. R.10.

C. The Coherent Jurisprudence of the Courts Under the ATCA Does Not Compromise the Ability of the Political Branches to Conduct Foreign Affairs.

Petitioner and the Government argue that *certiorari* is appropriate because the ATCA interferes with the essential foreign affairs prerogatives of the political branches. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

Baker v. Carr, 369 U.S. 186, 211 (1962). Petitioner's concerns reflect more hyperbole than analysis: over the years, the political branches – especially the executive branch – have sometimes supported the exercise of jurisdiction under the ATCA and sometimes opposed it. Nor do the Petitioner and the Government acknowledge that the courts have developed a variety of techniques and doctrines to screen out frivolous, vexatious, or politically charged cases.

i. The Executive Branch

As noted above, contemporaneous analyses by the Attorney General established that the ATCA provided a civil remedy for aliens injured by a tortious violation of the law of nations. In our own time, in multiple public pronouncements, the U.S. Department of State has also recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law. In describing the ATCA in its official submission to the U.N. Committee against Torture, for example, the Government of the United States declared that

> U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act . . . represents an early effort to provide a judicial remedy to individuals whose rights have been violated under international law.[9]

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[9] Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at 60 (emphasis supplied).

Petitioner's argument is also contradicted by executive branch submissions in human rights litigation under the ATCA. In *Filartiga*, for example, the government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found.[10] The United States took a similar position fifteen years later in *Kadic v. Karadzic*.[11] That the current Justice Department has taken a different view of some pending ATCA litigation does not imply that the meaning of this 214-year old statute should change from year-to-year and administration-to- administration.

ii. The Congress

Congress has twice legislated in this area over the past decade, and both times it has left the ATCA intact, in the process expanding, not restricting, the categories of international human rights claims cognizable in federal

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[10] *See* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *reprinted in* 19 INT'L LEG. MATS. 585 (1980), at 601-606.

[11] *See* Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035 (2d Cir. 1995).

court.[12] The TVPA *inter alia* codified the holding in *Filartiga* and extended it to citizens of the United States.[13] Congress was fully aware of the fractured opinions in *Tel-Oren*, *supra*, and, according to its principal sponsor, the TVPA was adopted to "lay it all to rest".[14] In multiple judicial decisions, the courts have found significance in the fact that Congress had a clear opportunity to revise or restrict the ATCA in light of *Tel-Oren* and did precisely the opposite. *See. e.g., Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 105 (2d Cir.

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[12] *See* TVPA, 28 U.S.C. § 1350 note (extending claims for torture and extrajudicial execution to U.S. citizens as well as aliens); and the "terrorist state" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000) (creating exception to sovereign immunity for lawsuits alleging specified human rights violations against certain States).

[13] According to the House Report, "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 . . . ." H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991). Significantly, the House Report referred to the *Filartiga* decision with approval, affirmed the importance of ATCA, and indicated that it "should not be replaced." *Id.* The Senate Report contains almost identical language. S. Rep. No. 249, 102d Cong., 1st Sess. (1991).

[14] Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36, 65 (1990) (statement of Senator Spector).

2000), *cert. denied*, 532 U.S. 941 (2001). *Accord Hilao v. Marcos*, 25 F.3d at 1475; *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). *Certiorari* jurisdiction should not be extended for the purpose of restricting a statute that Congress has endorsed in its current form and has shown no interest in restricting.

iii. The Courts

For Petitioner and the Government to suggest that the courts are powerless to protect themselves from abusive or politically dangerous cases is disingenuous: the judiciary has developed the political question doctrine and the act of state doctrine, *inter alia*, to ensure respect for separation of powers, and statutory immunities and the *forum non conveniens* doctrine may apply in appropriate cases.[15] It is significant for example that the executive branch has previously argued that there are circumstances in which the *failure* to allow ATCA litigation to go forward could adversely affect U.S. foreign

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[15], *See generally Kadic v. Karadzic*, 70 F.3d 232, 248-249 (2d Cir. 1995) ("We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations"). *Accord Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (dismissed for failure to prove international standards); *Abdullahi v. Pfizer, Inc.*, 2002 WL 31082956 (S.D.N.Y., Sept. 17, 2002) (dismissed under *forum non conveniens* doctrine); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D.Cal. 2002) (act of state doctrine barred adjudication of environmental tort and racial discrimination claims).

policy: "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *supra*, at 604. The government fully recognized then in its *Filartiga* brief that some ATCA cases could be highly-charged but not for that reason nonjusticiable:

> Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance.... [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. [citation omitted] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts.

Id., at 602-604. *Accord* Statement of Interest of the United States, *Kadic v. Karadzic* (2d Cir. 1995), at 3 ("Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them."). In short, the courts have access to effective, but fact-dependent doctrines that distinguish proper from improper cases under the ATCA. Granting *certiorari* in a case where the limits of these doctrines were not tested is unnecessary and unwise.

iv. Proving the content of custom

Petitioner and the Government assert that *certiorari* is appropriate because ATCA courts have turned to unratified and non-self-executing treaties, as well as the submissions of academics, to give content to the law of nations. But the courts in ATCA cases have relied on precisely the evidentiary authorities this Court has identified as appropriate in identifying international customary law. Contrary to the Petitioner's assertion, the ATCA does not and cannot enforce unratified or non-self-executing treaties. Nor does it convert non-binding resolutions of the United Nations into law. But by its terms, the ATCA does require the courts to determine the content of the law of nations, and that process is necessarily more complicated than consulting a treaty's text: customary international law arises out of a generally consistent state practice recognized out of a sense of legal obligation (*opinio juris*). The evidence of both the objective element and the subjective element can take many forms, so long as it reflects states' practice and the sense of obligation. *See, e.g., Restatement (Third) U.S. Foreign Relations Law*, § 102(2). *See also The Paquete Habana, supra*; *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

In *Filartiga*, for example, the Second Circuit concluded that torture was a violation of the law of nations on the basis of multiple, reinforcing forms of evidence, consulted not because they were binding *per se* as a treaty might be, but because they offered evidence that states considered torture illegal. No government disagreed with that conclusion, even though it was based *inter alia* on treaties in consistent form – including some to which the United States was not a party –

a draft convention prohibiting torture, laws and constitutions of states around the world, resolutions of international organizations condemning torture, the defenses offered by non-conforming states, and the writings of publicists. *Filartiga*, 630 F. 2d, at 882-84. Although the law of nations has no public law number, this Court has identified the sources that the courts should consult to give it content: "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators ." *The Paquete Habana*, 175 U.S., at 700. This accepted methodology was applied in this case.

Cases following *Filartiga* show a judiciary thoroughly familiar with this process, successfully distinguishing between norms that are "specific, universal, and obligatory," *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994), and those that are not.[16]

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[16] *Cf.*, *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D.Cal.1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations' ").

II. The Courts Are Not Divided on the "Proper Reach" of the ATCA: *Jus Cogens* Violations Are Sufficient but Not Necessary to Satisfy the Jurisdictional Requirements of the ATCA.

Petitioner argues that the Ninth Circuit's standard of liability "squarely conflicts" with the Second Circuit's liability standard, Pet. Br., at 22, alleging that the Second Circuit requires ATCA plaintiffs to establish not just a violation of customary international law but a violation of *jus cogens*, invoking the Latin phrase that refers to an elite subset of peremptory norms that can in principle invalidate a state's treaties.[17] *Certiorari* is inappropriate to consider this issue (and the academic esoterica on which it rests) because there is no conflict between the standards in the two circuits: Petitioner's allegations rest on a mischaracterization of the

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[17] Originally, *jus cogens* was a doctrine of Roman contract law, holding that the freedom of contract was necessarily limited by certain natural law principles of good morals and public justice. Its related meaning in contemporary international law is established by Section 102 of the Restatement (Third) of Foreign Relations Law:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §102, cmt. k.

Second Circuit cases, and subsequent Second Circuit decisions not cited by the Petitioner have explicitly affirmed that violations of customary international law – even when they fall short of *jus cogens* violations – are fully actionable under the ATCA in that Circuit. *See Flores v. S. Peru Copper Corp.*, 2003 U.S. App. LEXIS 18098 (August 29, 2003). The consistent position of every court to address and resolve the issue is that any interpretation of ATCA requiring *jus cogens* violations would be contrary to the plain language of the statute and misconceive the relationship between the law of nations a nd *jus cogens*. The circuit courts have therefore repeatedly and uniformly resisted the invitation of defendants, like the Petitioner in the proceedings below, to rewrite the ATCA to require *jus cogens* violations.

A. There Is No Split Among The Circuits On The Necessity *Vel Non* of a *Jus Cogens* Violation under the ATCA.

The Second and the Ninth Circuit courts are not split on the issue of whether ATCA is available only to enforce *jus cogens* norms, and Petitioner's argument to the contrary is based on his exaggerated and implausible parsing of the language in two Second Circuit cases, *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), and *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2nd Cir. 2000), for the proposition that Second Circuit ATCA jurisprudence recognizes only violations of *jus cogens* norms, at least with regard to individual – not state – defendants. However, as appellants must concede, Pet. 23 n.6, neither *Kadic* nor *Bigio* states that ATCA claims against individuals are limited to *jus cogens* violations. Despite the Second Circuit's use of the term "universal concern," *Bigio*,

239 F.3d at 448, the two cases do not offer an exclusive listing of the actions that fall under this category – much less state that "universal concern" is coterminous with *jus cogens*. At most, these cases demonstrate two endpoints of the ATCA's application – one at which the ATCA definitely applies (*e.g.*, war crimes, torture and genocide), another at which it definitely does not (*e.g.*, purchase by private individuals of property a state had previously unlawfully confiscated). They do not require a *jus cogens* norm for ATCA purposes.

The Second Circuit has recently confirmed that there is no conflict between its approach and that of the Ninth Circuit. In *Flores v. Southern Peru Copper Corporation*, 2003 U.S. App. LEXIS 18098 (August 29, 2003), the Second Circuit affirmed that ATCA claimants were only required to allege a violation of customary international law. *Id.* at *38. *Flores* involved an ATCA claim against a private corporation for environmental degradation. The court made no mention of any requirement to plead or prove *jus cogens* norms under ATCA and engaged in traditional customary law analysis.

The *Flores* standard is entirely congruent with the Ninth Circuit's approach in this case and in prior decisions. In *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467, 1474 (9th Cir. 1994) ("Estate II"), the Ninth Circuit held that under ATCA "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Accord Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). The Ninth Circuit has ruled that a *jus cogens* violation is sufficient to satisfy the "specific, universal, and obligatory" standard, *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) ("*Hilao II*"), but it has

never endorsed the more restrictive proposition that a *jus cogens* violation is necessary. To the contrary, in *Martinez*, the Ninth Circuit ruled that arbitrary arrest and detention were actionable under the ATCA without demonstrating that the prohibition on such conduct rose to the level of *jus cogens*. Similarly, in *Hilao II*, the Ninth Circuit explicitly noted that torture is "prohibited not only by a specific, universal, and obligatory norm but by one that reaches the level of jus cogens." 103 F.3d at 794. This language would be incomprehensible if the "specific, universal, and obligatory" criteria referred only to *jus cogens*.

The less strained interpretation is that the "specific, universal, and obligatory" standard allows the court to distinguish between genuinely customary international law and merely idiosyncratic or aspirational norms. The first courts to articulate the "specific, universal, and obligatory" test did so precisely to guide these sometimes difficult judgments. *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987). In short, no circuit court has limited the application of the ATCA to *jus cogens* violations, even in cases involving private actors.[18]

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[18] The question of the ATCA's applicability to private actors is ir relevant t o t he resolution o f t his c ase a s it ha s b een conceded since the beginning of this case that the appellant was acting under the color of law. *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990).

B. The Plain Language Of The ATCA Requires That Plaintiff's Meet the Exacting Requirements of Proving A Violation of The Law of Nations, Not the Extraordinary Requirements of Proving a Violation of *Jus Cogens*.

The words actually used by Congress in the ATCA refer only to "the law of nations or a treaty of the United States." There is no additional requirement that the plaintiffs' claims fall within an elite subset of customary law norms designated *jus cogens*.

It is clear under this Court's precedents, that a customary norm need not qualify as *jus cogens* in order to be justiciable generally. *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900), (the government's interference with domestic coastwise fishing vessels in time of war violated an established customary international norm, but there was no demonstration that such actions also satisfied the extraordinary test of jus cogens.). None of the cases require more under ATCA. *See, e.g., Filartiga v. Pena-Irala*, 630 F. 2d 800 (2d Cir. 1980) (holding that torture is a clear violation of customary international law without also demonstrating that the prohibition of torture amounted to *jus cogens*).

In summary, the actual language of the statute – "the law of nations or a treaty of the United States" – adopts a high but not the highest (and most controversial) jurisdictional threshold. There is no textual or historical basis for requiring the violation of a *jus cogens* norm under ATCA, and there is no split among the courts on this point.

III. There Is No Split among the Lower Courts on the Proposition That Arbitrary Arrest and Detention Are Violations of "The Law of Nations Or a Treaty of the United States."

The Ninth Circuit *en banc* ruled correctly that arbitrary arrest and detention are valid claims under the ATCA. There is no authority for the truth or the relevance of Petitioner's view that the freedom from arbitrary arrest and detention, traceable to the Magna Carta,[19] "undermines the federal government's anti-crime and anti-terrorism efforts." Pet. Br., at 27. To make this claim in the context of a case involving a defendant acquitted of all charges is an outrage.[20] The right to be free from arbitrary arrest and detention is fundamental to a democratic and free society. Petitioner

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[19] "No free man shall be taken or imprisoned…except by the lawful judgment of his peers or by the law of the land."

[20] Especially outrageous is Petitioner's invocation of 21 U.S.C. § 878(a)(3), dealing with the enforcement powers of DEA agents. Pet. Br., at 28. First, Petitioner is not and was not a DEA agent. International bounty hunters do not stand in the shoes of U.S. enforcement agents. Second, the fact that the United States has *jurisdiction to prescribe* (*i.e.* that its substantive criminal laws may apply extraterritorially) distinctly does not mean that it has *jurisdiction to enforce* (*i.e.*, that any U.S. agent may violate another state's territorial sovereignty). Enforcement powers, like arrest and detention, are inherently territorial, unless Congress explicitly rules otherwise. Section 878 is utterly silent on its applicability abroad.

would evidently like this Court to retry the issue of whether Respondent's brutal and lawless treatment amounted to a violation of international law – an issue it lost at the trial level and twice at the appellate level, once before the panel and once before the court *en banc*.

The right to be free of governmental abuse, especially in the process of arrest and detention, has been reaffirmed in international declarations such as the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (Article 9), numerous regional agreements such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, entered into force, Sept. 3, 1953, 213 U.N.T.S.222, E.T.S. No. 5 (Article 5), and in binding international covenants such as the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Article 9). It is also enshrined in national constitutions and laws, most notably the Fourth Amendment to the U.S. Constitution.

Applying these uncontroversial standards, the courts have repeatedly and uniformly affirmed the principle that arbitrary arrest or detention violates international law. *See, e.g., Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995); and *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987). There is no split among the circuit courts on this issue, and *certiorari* is

inappropriate to engineer a retrial on the underlying issue of the Petitioner's liability.

CONCLUSION

This Court's *certiorari* jurisdiction should not be used to resolve academic debates, as is inevitable when there is no disagreement among the lower courts on the questions presented. The petition for a writ of *certiorari* should be denied.

October 6, 2003

Respectfully Submitted,

Paul L. Hoffman
Ralph G. Steinhardt, III
Erwin Chemerinsky
Mark D. Rosenbaum
Alan I. Rubin

Attorneys for Respondent
Dr. Humberto Alvarez-
Machain